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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

RACHEL BAUCHMAN,

Petitioner,

—v.—

WEST HIGH SCHOOL, *ET AL.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE OF THE AMERICAN JEWISH CONGRESS AND AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE IN SUPPORT OF A PETITION FOR A WRIT OF CERTIORARI

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RACHEL BAUCHMAN,

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

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1. The American Jewish Congress and Americans United for Separation of Church and State respectfully seek leave to file the attached brief *amici curiae* in support of Petitioners.
2. The Petitioners consented to the filing of this brief; Respondent Torgeson and Intervenors consented; other Respondents have not responded to our request for leave.
3. Both *amici* routinely are involved in Establishment Clause litigation. The pleading standards created below are thus important to their ongoing work.
4. For these reasons, the two organizations respectfully request permission to file the attached brief.

Marc D. Stern

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INTEREST OF THE *AMICI*

The American Jewish Congress (AJCongress) is an organization of American Jews founded in 1918 to protect the civil, political, economic and religious rights of American Jews.

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Americans United for Separation of Church and State is a national, nonsectarian organization committed to preserving religious liberty and separation of church and state. Americans United has appeared frequently before the Court on church-state issues and filed a brief in the Tenth Circuit below.

ARGUMENT

There are three compelling reasons to grant a writ of certiorari: the decision below imposing a heightened pleading requirement where motive is at issue is in direct conflict with *Crawford-El v. Britton*, 66 U.S.L.W. 4311 (1988); it imposes almost no limits on the use of religious music in public schools, in conflict with the decision of the Eighth Circuit in *Florey v. Sioux Falls School District* 49-5, 619 F.2d 1311 (8th Cir. 1981); and it rejects binding holdings of this Court that government may not act with religious motives or with a religious purpose.

I. THE DECISION BELOW CONFLICTS WITH *CRAWFORD-EL*

A. The Original Complaint

The panel decision flies in the face of the regime of notice pleading mandated by the Federal Rules of Civil Procedure ("Rules"). The decision below imposed a stricter pleading regime in Establishment Clause motive cases than *Crawford-El* permits.

With limited exceptions noted in Rule 9(b) regarding fraud or mistake, which must be pled with particularity, all the Rules require of a complaint is a "short and plain statement" of the claim sufficient to put defendant on notice. Rule 8(a). The Rules specifically sanction general pleadings where a state of mind (*e.g.*, motive) is relevant. *Id.* This Court's recent decision in *Crawford-El v. Britton* explicitly relied on the Rules to invalidate a District of Columbia Circuit rule imposing heightened requirement of particularized pleading and proof in motive cases.

Notwithstanding these long-settled principles, and their recent reaffirmation in *Crawford-El*, the panel majority insisted on particularized claims of illicit motive:

> [I]n her original complaint, Ms. Bauchman alleges no facts to expressly indicate the purpose for selecting a majority of religious songs to be sung at religious venues or that the Choir curriculum has the effect on a reasonable observer of advancing or endorsing religious beliefs. .... We will not infer an impermissible purpose or effect in the absence of

> any supporting factual allegations. See *Lynch v. Donnelly*, 465 U.S. at 680 (1984) (district court erroneously inferred from religious nature of creche that city had no secular purpose for display) ....

[A-23]

As *Lynch* reached this Court, it was not a sufficiency of a pleading case, but a judgment on a full trial record. *Lynch* does not illuminate the standard to be applied to judging the sufficiency of a pleading.

A case may not be dismissed at the pleading stage unless, under any set of facts which might be proven, plaintiff cannot prevail. *Conley v. Gibson*, 355 U.S. 41 (1957. Petitioner Bauchman, having alleged that religious songs were sung in religious venues clearly could have proven a set of facts about her original claim sufficient to survive a motion to dismiss, *i.e.*, that the teacher or the district acted with a motive of aiding religion, or that the overall effect of the choices, combined with the venue in which they were sung, was to endorse religion.

Nothing in *Lemon v. Kurtzman*, 403 U.S. 621 (1971), or any subsequent case applying its three-part test, suggests that the test was other than one for evaluating proof. Nowhere did the *Lemon* Court suggest that a plaintiff need allege any of its elements generally, much less with particularity. A party is not, in any event, required to plead a legal theory. *Conley, supra*; *Bartholet v. Reishavier A.G.* (Zurich), 953 F.2d 1073 (7th Cir. 1992).

That the court below confused pleadings and proof is evident from what follows the above quoted paragraph. The majority faulted Bauchman's complaint not only for failing to allege *in hæc verba*, a sectarian purpose, but also for failing to negate any possible secular purpose. The upshot is that an entire Establishment Clause case, proof and negation of any possible defenses must be pled at the outset without benefit of discovery, and subject to Rule 11 sanctions for unsustainable claims, on pain of dismissal for failure to state a claim. This is surely not notice pleading. It is a not-so-subtle way of excluding Establishment Clause claims at the threshold.

The majority reasoned that:

> [We] cannot allow Ms. Bauchman to support her claim with allegations focused solely on the religious component of classroom activity, since such approach would inevitably lead to invalidation of the activity under the Establishment Clause.

[A-24]

This again confuses pleading with proof. One can plead that a practice violates the Establishment Clause, but fail to prove it. That possibility of a failure of proof does not justify a dismissal for failure to state a claim, any more than the possibility that a claim of an unreasonable search will fail of proof precludes the claim that it was unreasonable.

B. The Amended Complaint

Even if the original complaint was deficient in failing to specifically allege a purpose of advancing religion, the

proposed amended complaint amply made up for the deficiency. Indeed, the panel conceded that it adequately alleged improper motive. [A-37] Bauchman proffered substantial evidence that, before the present controversy alerted him to the risks of such statements, her teacher had made statements and taken actions which indicated a religious purpose, in both choice of song and venues, and made statements which might be taken as attacks on anyone who did not share the teacher's religious beliefs.

The court below nevertheless refused to permit the filing of an amended complaint, because the proposed amended complaint did not offer "contemporary evidence" of such a purpose. [A-39] In addition to repeating its criticisms of Bauchman's original complaint, it insisted that only evidence of a statement by the teacher during the year Bauchman was in the choir would suffice. Evidence of motive and intent from prior school years was ruled irrelevant.

This novel evidentiary proposition is at odds with settled rules of evidence, F.R.Ev. 404(b) and cases such as *City of Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983), citing *O'Shea v. Littleton*, 414 U.S. 488, 496 (1974); *UMW v. Pennington*, 381 U.S. 657, 670 n.3 (1965), all permit consideration of prior conduct as evidence of present motive.

Under the Tenth Circuit's ruling, a complaint is insufficient if it alleges that a teacher instituted an arguably religious curriculum, announced at its inception that she was incorporating religious materials because she wished to glorify God and save students from hell, continued the same

program without change for decades, but failed to announce yearly her religious purpose. That cannot possibly be right.

Surely no one would suggest that if a government official announced a racist motive in adopting a policy, and kept that same policy in place unchanged for years, someone adversely affected later could not proffer the original comment as proof of the policy's racial taint. The argument would fail because it was rejected in *Hunter v. Underwood*, 471 U.S. 222 (1985), where a century-old illicit racist motive invalidated a felon disqualification law. *Cf. City of Mobile v. Bolden*, 446 U.S. 88 (1980). Establishment Clause claims should be no different, or if they are, this Court should explain why.

The Tenth Circuit thought its limitation on the use of evidence necessary to protect religious public officials from harassment and inquiry merely because they were religious. [A-41] *Crawford-El* teaches that the possibility of abusive discovery cannot justify higher standards of pleading. Discovery abuses can be controlled by the district court, as the *Crawford-El* majority noted. The district courts can supervise depositions, order progressive discovery or enter protective orders.

The singing of religious songs during religious holidays by a public school choir in houses of worship is permissible only if done with a secular educational purpose, sufficient to displace the religious nature of the program. Prior evidence of an illicit purpose is surely sufficient for pleading purposes to permit further inquiry, not because the official conducting

the program is religious, but because his acts were arguably a continuation of unconstitutional conduct.

In short, Bauchman had stated a claim. It was an error to dismiss the complaint. The error was compounded when Bauchman was denied leave to file a detailed and particularized amended complaint. The pleading rules applied below are inconsistent with *Crawford-El*, the Federal Rules of Procedure, and the Federal Rules of Evidence. If left unreviewed, the decision below would create uncertainty about procedure in an important category of constitutional cases.

II. THE DECISION BELOW CONFLICTS WITH THE DECISION OF THE EIGHTH CIRCUIT IN *FLOREY V. SIOUX FALLS SCHOOL DISTRICT 49-5*

The second reason to grant certiorari is the question of what (if any) restrictions apply to the use of religious music in the public schools. This Court has never addressed that question. Nevertheless, it annually confounds educators, school boards and communities.

The panel decision, giving blanket permission for public schools to use religious music irrespective of its sectarian religious content—provided that school officials do not foolishly confess an actual religious purpose—is in considerable tension, if not outright conflict, with *Florey v. Sioux Falls School Dist. 49-5*, *supra*, which, while permitting religious music to be used for educational purposes, imposes far greater restraints on its use.

Florey involved a facial challenge to rules permitting use of religious music as part of a secular program of education when done in a "prudent and objective manner." While upholding the rules, the Eighth Circuit acknowledged that activities undertaken pursuant to the rules could be subject to meritorious "as applied" challenges. It specifically cited a particular "play" performed in an earlier year as "predominantly religious" and hence impermissible, and exceeding constitutional bounds. 619 F.2d at 1317-18. It concluded that the constitutionality of "any particular school activity ... cannot be determined until and unless there is a specific challenge, supported by evidence ...." *Id.* at 1319.

By contrast, the Tenth Circuit held that even a specific challenge to specific programs cannot withstand a motion to dismiss absent a contemporaneous confession of unconstitutional purpose. It also somehow decided that singing religious hymns is not a prayerful activity [A-21, n. 8], and hence not unconstitutional, even though religious songs are a well-nigh universal religious practice, and even though a practice may be religious for constitutional purposes but not prayerful. Accord, *Stone v. Graham*, 449 U.S. 39 (1981) (Ten Commandments in school). To make matters worse, Bauchman's amended complaint alleges that her teacher verbally excoriated her, making her dissent from her teacher's religious beliefs quite relevant to her standing in the school community. *Lynch v. Donnelly*, 465 U.S. 668, 689-90 (1984) (O'Connor, J., concurring). None of this was sufficient to state a claim.

The resulting inter-circuit conflict is certain to confuse school districts as they struggle with whether and how to perform religious music.

III. The Decision Below Defies Numerous Decisions of This Court

These two errors arise from a third, more serious error. The court below announced that it was convinced that this Court erred in considering motive and purpose in Establishment Clause cases. Endorsing the dissenting views of Justices Rehnquist and Scalia, the majority of the Tenth Circuit concluded:

> [W]e agree [the purpose test] is an unworkable standard that offers no useful guidance to courts, legislators or other government actors who must assess whether government conduct goes against the grain of religious liberty the Establishment Clause is intended to protect. Nevertheless, the appropriate scope of the endorsement test and the appropriate Establishment Clause analysis, in general, cautions us to apply both the purpose and effect components of the refined endorsement test ....

[A-20-21]

On the most generous reading, this reads like a judicial petition for certiorari, which *amici* agree should be granted. At worst, it is a brazen defiance of the judicial hierarchy which colored the court's judgment on the elements of proper allegations of improper religious purpose. That defiance must be corrected. "Unless we wish anarchy to prevail within

the federal judicial system, a precedent of this Court must be followed by the lower federal courts not matter how misguided the judges of those courts may think it to be." *Hutto v. Davis*, 454 U.S. 364, 375 (1982). Either way, review here is warranted for this Court to decide whether—and we hope to reaffirm that—government may act for secular purposes only.

CONCLUSION

For the reasons stated, a writ of certiorari should issue.

Respectfully submitted,

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